prior to the Panco accident the gate had fallen on another soldier's car. Although the gate was put back up before injuring Panco, it was not shown how the gate was reinstalled. In that action, Sergeant Panco sued only Hazard and DeSantis. While Hazard subsequently impleaded Central Fence, that third party action was severed prior to trial and Central Fence accordingly did not participate.

The gate that is the subject of the present action was installed in one of the later projects. It differed from the "Panco" gate in a number of particulars. In the first place, the "Daneshmand" gate was fabricated on site by DeSantis whereas Central Fence had fabricated the "Panco" gate in New York. (JA 474). Because of the problem he had earlier encountered with the "Panco" gates bowing, DeSantis added two vertical struts to the "Daneshmand" gates to increase their rigidity. (JA 418-419; 460-461). Additionally, the "Daneshmand" gates were installed on a level concrete surface and the gate's weight was thus supported by its wheels when extended.

Yet another difference between the two gates was the fact that after DeSantis had hung and adjusted the "Daneshmand" gate, the electrical subcontractor, Mallory Electric, improperly used one of the gate's roller brackets to ground an electric cable. (JA 368-370; 646-648). After Daneshmand's accident, that roller bracket was found out of position. (JA 363-364; 673; 684). DeSantis, identified as an expert witness by both Hazard and Central Fence, opined at trial that grounding the wire in that manner allowed the gate to fall. (JA 462-466; 488).

Both at trial (JA 413; 419; 455; 491-493) and during his February 1, 1989 discovery deposition, that was

noticed in both the *Panco* and *Daneshmand* cases (JA 1395), DeSantis pointed out that his critical comments were directed only towards the gates installed on the "Panco" project, the temporary maintenance facility, and that he was quite satisfied with the "Daneshmand" gates that he had fabricated himself (JA 1409-1410; 1451; 1512-1513; 1529-1530; 1532; 1541-1542).

On the basis of the differences between the two gates, as well as the differences between the circumstances under which each fell, Respondents moved the trial court to preclude the Petitioner from introducing, or otherwise relying upon, evidence of the earlier accident involving Sergeant Panco (JA 15-23). During trial, the Respondents consistently objected to Petitioner's repeated attempts not only to impeach DeSantis on the basis of his deposition testimony critical of the "Panco" gate, but also DeSantis' testimony along with that of other witnesses from the Panco trial on the ground that the "substantial similarity" test had not been, and could not be, satisfied. (JA 397-400; 864-865). Those objections were sustained and affirmed on appeal.

The trial court also refused Petitioner's repeated efforts to attach fault to the several Respondents on the basis of the gates' admittedly deficient design. As noted above, the gates had been designed by a third party at the behest of the Corps of Engineers and that third party had not been named as a defendant in the action.

REASONS FOR DENYING THE WRIT

The Petition in this case represents nothing more than the unwillingness of the Petitioner to accept the

well-reasoned and narrowly tailored opinions of both the district court and the Fourth Circuit.[3] Their decisions were based upon a detailed factual record, which demonstrated that the Petitioner failed to adduce sufficient evidence to withstand a motion for directed verdict. The Petitioner is equally unpersuasive in advancing sufficient grounds for review by this Court.

1. Constitutionality of Directed Verdict

The constitutionality of the directed verdict is well-settled. As this Court observed in *Galloway v. United States*:

> If the intention is to claim generally that the [Seventh] Amendment deprives the federal courts of power to direct a verdict for insufficiency of evidence, the short answer is the contention has been foreclosed by repeated decisions made here consistently for nearly a century. More recently, the practice has been approved explicitly in the promulgation of the Federal Rules of Civil Procedure.

319 U.S. 372, 389 (1943) (footnote omitted). Similarly well-settled is the appropriateness of applying federal law on the sufficiency of evidence necessary to create a jury issue. The majority of circuit courts, including the Fourth Circuit, apply federal law to determine sufficiency of the

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[3] Because of the limited nature of the opinions, neither the district court nor the Fourth Circuit published their opinions. The district court opinion was issued from the bench and the Fourth Circuit opinion was "unpublished."

evidence.[4] The Court has declined to review the issue in the past and it does not merit review in this case.[5] Moreover, the very standard that the Petitioner seeks to apply, the "scintilla of evidence," has been explicitly rejected by this Court as inadequate. *Gunning v. Cooley*, 281 U.S. 90, 94 (1930).

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[4] The Courts of Appeal that apply federal law to determine sufficiency of the evidence include:

Fourth Circuit: *Owens by Owens v. Bourns, Inc.*, 766 F.2d 145, 149 (4th Cir.), *cert. denied*, 474 U.S. 1038 (1985); *Bryan v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 565 F.2d 276, 281 (4th Cir. 1977), *cert. denied*, 435 U.S. 943 (1978); *Wratchford v. S.J. Grove & Sons Co.*, 405 F.2d 1061, 1064-65 (4th Cir. 1969).

Fifth Circuit: *Porter v. American Optical Corp.*, 641 F.2d 1128, 1137 (5th Cir.), *cert. denied*, 454 U.S. 1109 (1981); *Two Rivers Co. v. Curtiss Breeding Serv.*, 624 F.2d 1242, 1249 (5th Cir. 1980), *cert. denied*, 450 U.S. 902 (1981).

Seventh Circuit: *Brown & Williamson Tobacco Corp. v. Jacobson*, 644 F.Supp. 1240, 1257 (N.D. Ill. 1986), *aff'd in part, rev'd in part*, 827 F.2d 1119 (7th Cir. 1987), *cert. denied*, 485 U.S. 933 (1988).

Eighth Circuit: *Farner v. Paccar, Inc.*, 562 F.2d 518, 522 (8th Cir. 1977).

Tenth Circuit: *Bannister v. Town of Noble*, 812 F.2d 1265, 1268 (10th Cir. 1987).

Eleventh Circuit: *Kicklighter v. Nails by Jannee, Inc.*, 616 F.2d 734, 738 (11th Cir. 1980)

[5] Ironically, Virginia also insists that the evidence be sufficient to permit the jury to find the requisite element of causation as "probable" and not a "mere possibility." *White Consolidated Indus., Inc. v. Swiney*, 237 Va. 23, 28, 376 S.E.2d 283, 285 (1989) (quoting *Southern States Coop. v. Doggett*, 223 Va. 650, 657, 292 S.E.2d 331, 335 (1982)).

2. Constitutionality of Local Rules

The Petitioner next argues that the fact that the Fourth Circuit opinion was "unpublished" somehow deprives him of due process and equal protection. The reasoning advanced by the Petitioner is unclear; however, his failure to make this argument to the Fourth Circuit in his Petition for Rehearing means that its consideration by this Court is foreclosed. *United States v. Williams*, 112 S.Ct. 1735, 1738 (1992) (question not pressed or passed upon below precludes grant of certiorari); *see also Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970).

CONCLUSION

For the reasons stated, Respondents R. B. Hazard, Incorporated, Central Fence of CNY, Incorporated, and Thomas DeSantis, Jr. t/a Fence World respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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May 31, 1994